IN THE

Supreme Court of the United States

JAN 14 19
MICHAEL RODAK, JR.

October Term, 1973

No. 73-1102

TRANSCON LINES,

Petitioner,

vs.

XEROX CORPORATION,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

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Petition for Writ of Certiorari to the Court of Appeal, Second Appellate District, State of California.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

This is an action against a common carrier on a freight claim arising from a shipment in interstate commerce.

Petitioner, the defendant and respondent below, respectfully prays that a writ of certiorari issue to review a decision of the Court of Appeal, Second Appellate District, State of California, filed August 21, 1973. Petition for rehearing in said court was denied. Petition for hearing in the Supreme Court of California was denied on October 18, 1973. The decision for which review is sought, which was not published, reversed a summary judgment of the Superior Court of the State of California for the County of Los Angeles, in favor of defendant and respondent in that court, petitioner herein, entered June 12, 1972.

Opinion Below.

The opinion of the Court of Appeal, Second Appellate District, State of California, filed August 21, 1973 is printed in Appendix "A" annexed to this petition. Also printed in Appendix "A" is a copy of the order by said court denying rehearing. A copy of the order by the Supreme Court of California denying a hearing dated October 18, 1973 is also printed in Appendix "A".

Jurisdiction.

The statutory provision which confers jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. Sec. 1257(3). The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Sec. 20(11) is the statute of the United States determining the rights of the parties. Also involved is Sec. 2(b) of the terms and conditions of the Uniform Domestic Straight Bill of Lading prescribed by the Interstate Commerce Commission in accordance with said statute. The federal question is whether or not the declination in writing by petitioner herein on April 10, 1969 of the freight claim filed by respondent herein, started the two year and one day period of Section 2 (b) of the Bill of Lading running. Said declination occurred more than two years and one day before respondent herein filed its lawsuit on June 16, 1971. Said question was first raised in the Superior Court in the first affirmative defense in the answer of petitioner herein to the complaint of respondent herein in said lawsuit (para. 25 of said Answer to Complaint).

Said federal question was next raised in said Superior Court in the notice of motion for order for summary judgment in favor of defendant Transcon Lines, filed in said Superior Court on February 14, 1972, and the motion on the hearing thereof on March 16, 1972, was denied.

Thereafter on March 31, 1972, a notice of motion to reconsider the ruling denying defendant's motion for summary judgment was filed. At the hearing thereof on May 3, 1972 said motion was granted, and the order of March 6, 1972 was vacated, and at said time defendant's motion for entry of summary judgment and to dismiss the complaint was granted.

Thereafter a notice of appeal was filed in the State Appellate Court by plaintiff and appellant Xerox Corporation on June 20, 1972. The brief and opinion in the Court of Appeal all involve the federal question first raised in the Superior Court. The action, though involving interstate commerce, is authorized to be filed in the State Court in the Carmack Amendment itself, 49 U.S.C. Section 20(11).

Question Presented.

In freight shipments in interstate commerce under the Uniform Domestic Straight Bill of Lading, when is a written notice disallowing a claim or some part of it, given under Section 2(b) of said Bill of Lading by the Carrier to the Claimant, sufficiently definite as to disallow the claim or some portion of it so as to start the running of the two year and one day limitation period within which lawsuits on such claims must be filed?

Statutes Involved.

49 U.S.C. Sec. 20(11); 49 U.S.C. Sec. 319; Rule 977 of California Rules of Court (effective January 1, 1974); Section 2(b) of the Uniform Domestic Straight Bill of Lading, the text of all of these being set forth in the Appendix hereto.

Statement of Facts.

On October 28, 1968, Xerox delivered to Transcon at the Xerox plant in Blauvelt, New York, three shipping containers described on the bill of lading as "Machines, copying, duplicating or reproducing" for carriage, consigned to Bekins Moving and Storage in San Antonio, Texas. Said shipment was delivered November 7, 1968 by Merchants Fast Motor Lines, Inc. who as a connecting carrier, received the shipment from Transcon, and at the time of delivery, the consignee Bekins signed for the receipt of the shipment from the carrier, clear, no exception having been taken to the condition of the shipment at the time of delivery. Subsequently, inspection was requested by Bekins on behalf of Xerox on November 19, 1968, said request being directed to the delivering carrier, Merchants Fast Motor Lines, Inc. On November 20, 1968, the freight inspector from Merchants Fast Motor Lines made the inspection of the shipment and prepared a report of his inspection. Thereafter on February 19, 1969, Xerox filed a claim with the claim agent of Transcon Lines at Newburg, New York for $22,546.00. Claimant's Number being E111128 DO. On April 10, 1969 Transcon sent

Xerox a notice in writing declining the claim filed by Xerox on February 19, 1969 on the October 28, 1968 shipment, stating in said notice, "Your claim was denied for the following reason: Shipment was delivered 'Clear'." On April 17, 1969, Xerox wrote Transcon returning the claim papers and requesting reprocessing of the claim and at the beginning of the second paragraph of said letter stated: "You have declined our claim indicating that the shipment was delivered 'clear'."

The claim was reprocessed and reinvestigated and additional correspondence was exchanged and again on October 1, 1969, Transcon sent Xerox a letter declining the claim. The lawsuit in the Superior Court for the State of California, County of Los Angeles, was filed June 16, 1971, which was more than two years and one day after the first notice, dated April 10, 1969, was given in writing declining the claim.

In the original court ruling on March 16, 1972, Judge Berg in denying the motion for summary judgment stated: "Whether there was an unequivocal disallowance presents a possible question of surrounding facts, circumstances or customs which should be resolved upon a trial of the issues." Upon the motion to reconsider the decision denying the motion for summary judgment and for summary judgment which was heard in the Superior Court on May 3, 1972, Judge Berg in granting the motion to reconsider his earlier denial and in granting summary judgment stated: "We feel that the motion actually is well taken, that interpreta-

tion and intent of the parties would have no bearing on the resolution of this legal issue." The Court thereby determined that the decision as to whether or not a notice was an unequivocal disallowance of a freight claim was a matter of law which the Court would determine from the writing of April 10, 1969, itself. In this connection the Court construed the notice of April 10, 1969, given by the carrier Transcon to the claimant Xerox as an unequivocal disallowance of Xerox's said claim.

The Court of Appeal, Second Appellate District, State of California, in its opinion filed August 21, 1973, agreed with the lower Court that the determination as to whether or not a notice in writing by the carrier to the claimant was an unequivocal disallowance under Section 2(b) of the terms and conditions of the Uniform Domestic Straight Bill of Lading was a matter of law to be determined solely from the notice itself. Said Court then construed the notice of April 10, 1969, to be an indefinite disallowance and therefore equivocal. The petition for rehearing in the Court of Appeal was denied and the petition for hearing in the Supreme Court of the State of California was denied on October 18, 1973.

REASONS FOR ALLOWANCE OF THE WRIT.

The Supreme Court of the United States has not previously stated in any written opinion what the requirements are of a notice in writing disallowing a freight claim against a carrier or any part or parts of the claim specified in the notice. The Supreme Court of the United States is urged to grant the petition in this matter and consider the question presented for a number of reasons.

In the opinion of the Court of Appeal of California filed August 21, 1973, the conclusion as a matter of law that the written notice of April 10, 1969, was not an unequivocal rejection of the claim is not supported by the decisions of the other courts in the United States that have heard and considered cases involving the two year and one day limitation found in Section 2(b) of the Uniform Domestic Straight Bill of Lading. Under those decisions, it would appear that the notice of April 10, 1969, was a definite disallowance of the freight claim filed by Xerox, and the period of two years and one day should have commenced with the sending of that letter. At page 6 of the opinion in the Court of Appeal, the Court comments that if Transcon had merely stated that the Xerox claim was declined, the disallowance would have conformed with the language of both the federal statute and the bill of lading and the limitations period would have started to run. Because Transcon used a form which after declining the claim listed a number of reasons which could be checked to indicate the reason for the declination and because some of those reasons elicited reconsideration of at least a part of the claim as filed, the court said the words "your claim declined" did not

always necessarily constitute a *final* rejection. As a matter of law the Court concluded that the notice of April 10, 1969 was not an unequivocal rejection, but "left the door open" for further review of Xerox's claim for concealed damage.

To understand why this decision is against the weight of authority, reference to the language of the Federal statute, to the terms and conditions of the Uniform Bill of Lading and to the pertinent cases is in order.

The statutory basis for the filing of claims against carriers on freight moving in interstate commerce by common carrier is found in 49 U.S.C. Sec. 20(11). Near the end of the paragraph, it provides in part:

> "That it shall be unlawful for any receiving or delivering carrier to provide by rule, contract, regulation or otherwise, a shorter period for the filing of claims than nine months and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

Although the quoted section is found in what is commonly called the Carmack Amendment to the Hepburn Act and did not apply to motor freight common carriers when it first became law, because such carriers were not then regulated under the Interstate Commerce Act, it was made applicable to motor freight common carriers in 1935 by the passage of Part 2 of the Interstate Commerce Act commonly known as the Motor Carrier Act. Section 319 of the Motor Carrier Act,

usually cited as 49 U.S.C. Section 319, specifically makes Sections 20(11) and (12) applicable to motor carriers. The Interstate Commerce Commission as described in 52 Interstate Commerce Reports at page 671 and thereafter, after holding hearings in which both carrier and shippers participated, adopted the Uniform Domestic Straight Bill of Lading. When adopted, Section 2(b) of said Bill of Lading provided that as a condition precedent to recovery, claims must be filed in writing with the carriers designated therein within six months after delivery of the property and suit shall be instituted only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. In 1930 the six-month period was changed to nine months. The language of Sec. 2(b) of the terms and conditions of the Uniform Bill of Lading has remained virtually unchanged since 1930.

Under the plan for the handling of freight claims set forth in the Statute and the Bill of Lading, the first important date is the date on which a shipment is delivered. The claimant must file his claim in writing with the carrier within nine months thereafter. Since these are expressly made conditions precedent, the failure to file a claim in writing with the carrier within nine months after a shipment is delivered extinguishes carrier liability for claims.

The time for investigation by the carrier of claims properly filed is not limited by the statute and the claimant is not charged under the statute with the time it takes the carrier to investigate the claim and reach a decision as to whether to allow or disallow the

claim. If the carrier decides to allow the claim as filed and does not decline the claim or any part of the claim, the carrier proceeds to pay the claim and neither the statute nor the bill of lading provision need be considered. If the carrier gives the shipper or consignee a notice in writing disallowing the claim or any part or parts thereof specified in the notice, the shipper then has two years and one day from the date on which such notice is given within which to reach an agreement with the carrier as to the amount of the claim which the carrier will pay and conclude payment or to file a lawsuit on the disallowed claim.

Under the language of both Sec. 20(11) of the Carmack Amendment and Section 2(b) of the Bill of Lading, it is contemplated that a notice may be sent by the carrier to the claimant disallowing a portion of a claim only and that such notice will be sufficient to start the two year and one day period running. There is no statutory or bill of lading restriction stating that the notice of disallowance may contain the declination and nothing else, nor is there any attempted prescription as to the contents of the notice except that it disallow the claim or any part or parts thereof specified in the notice. There is no prescription against the notice disallowing a part of the claim and allowing part of the claim. Such letters were held to have started the period running in *Burns et al. v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.*, 192 F.2d 472, decided by the United States Court of Appeals, 8th Circuit, on November 12, 1951, the leading case on the subject, and in *H. Rouw Co. v. Texas & N.O.R. Co.*, 260 S.W.2d 130 (CCA, Texas, 1953), the *Burns* case having been cited with approval in *Hangar v. Allied Van Lines* (Dist. Col. Ct. of App. 1964) 204

A.2d 420, and *Holford v. Louisville & Nashville Railway Co.* (U.S. Dist. Ct., W.D. Tenn. 1967) 266 Fed. Supp. 408.

There is no authority, apart from the opinion in the court below in this case, which supports the view that a notice in writing stating as it does "Your claim declined." is not the notice in writing that will start the running of the two year and one day period prescribed in Section 2(b) of the Uniform Bill. The only case cited by Xerox in all of these proceedings in support of their position as to the notice itself is *Robinson v. Trustees of New York, New Haven & Hartford Railway Co.*, (S.J.C. of Mass., April, 1945) 16 N.E.2d 593, a case which actually is not in point. The notice in that case said that the carrier intended to decline the claim at a future time. It is understandable that the court felt that such a notice was not the notice of disallowance described in Section 2(b) of the Uniform Bill of Lading. To find out whether the carrier acted upon its intention you would have to wait until the future date to see whether or not at that time the carrier followed through on its intention and actually declined the claim. If it did not, then no declination would actually have occurred and the period would not have started running.

The tendency, which results from the opinion of the Appellate Court of California, to restrict the wording of the declination that will start the two year and one day period running to the formula set out in the opinion would, if applied, work very badly in the day to day transactions respecting claims between carriers and shippers. It also would be most unfair to the carriers. At the time that the carrier concludes its investigation

of a claim, the carrier normally notifies the shipper as to the results of the carrier investigation. If a claim as filed is allowed, the carrier notifies the shipper of that fact and usually pays the claim shortly thereafter. If the carrier disallows the claim as filed either by disallowing any specified parts of it or the whole of the claim, it makes sense that the carrier not only will tell the shipper of the decision to disallow certain specified parts of the claim or the whole thereof but also to give the reasons for such disallowance. Reasons given for a decision at the time the decision is given make for a better understanding of the decision. Such reasons may further expedite the handling as to that portion of a claim which is allowed. The tenor of carrier-shipper relations with respect to claims is improved with a statement of the reasons accompanying the declination of a claim. However, if a carrier by stating the reasons for disallowing a claim jeopardizes the effect of the disallowance itself in starting the two year and one day period, carriers will tend to eliminate the statement of reasons upon which a disallowance is based when notifying a shipper that his claim is disallowed in whole or in part. It is important to both carrier and shipper to know whether or not a notice given by a carrier to shipper commences the running of the two year and one day period within which to file a lawsuit. Record storage at the motor freight terminal level has become such a problem that many large motor freight carriers destroy their terminal records after three years from the date of delivery. Hopefully in connection with shipments on which claims have been filed, those records will be gathered in the claim file and will be preserved. However, with the central handling of claims at carrier headquarters, the danger of destroying records needed

in the handling of claims is a real one. Shippers too, have had a very real problem of record retention for longer than it is necessary to retain the record.

The opinion of the court below results in unequal treatment of carriers and shippers under the Interstate Commerce Act. Equal treatment was clearly prescribed by the Supreme Court of the United States in the case *Mid-State Horticulture Company, Inc. v. Pennsylvania Railroad Co.*, (1943) 320 U.S. 356, particularly at pages 361, 362 and 363. Under Section 2(b) of the Uniform Bill of Lading, the decisions have increasingly relaxed the requirements as to the writing to be filed by the shipper with the carrier within the nine-months period to constitute a valid claim. These cases culminate with the case of *Thayer v. Pacific Electric Railway Co.*, (S.Ct. of Calif. 1961) 55 Cal.2d 430, in which a notation "Damage on this shipment, 4/20/55, C. D. Hileman." made on the freight bill by the carrier's agent while in the plaintiff's office at the time the carrier's agent collected the freight charges from the plaintiff therein, was held to constitute a claim filed with the carrier in compliance with Section 2(b) of the Uniform Domestic Bill of Lading.

Based in part on the view of the Supreme Court of the United States in *Mid-State Horticulture Company, Inc. v. Pennsylvania Railroad Co., supra*, the decision in the *Burns* case, *supra*, and in the *Rouw* case, *supra*, had the effect of clarifying the law as to minimizing formal requirements with respect to the notice of declination and of construing a notice in writing which fairly conveyed to the shipper the fact that at least a portion of the claim as filed was declined by the carrier as sufficient to start the running of the two year and

one day limitation on the filing of suits regardless of what else was contained in the notice. To say that when it comes to considering whether a shipper has filed a claim properly under Section 2(b) almost any writing is sufficient but that when it comes to considering the carrier's disallowance of the claim, the carrier has to meet formal requirements or the disallowance is ineffective, is not to give equal treatment to shipper and carrier under the Interstate Commerce Act.

The concept of *final* disallowance as expressed in the opinion in the Appellate Court below and also in the *Robinson* case, *supra*, is clearly one which has no proper place in this field. The language of the statute involved in describing the notice in writing as "disallowing the claim or any part or parts thereof specified in the notice" indicates that Congress intended that correspondence between shipper and carrier written after the notice of disallowance has been given would not extend or delay or interrupt the running of the two year and one day period. The disallowance of a part of a claim is not a *final* handling of the claim. Additional correspondence may occur discussing the part disallowed, discussing the part of the claim allowed, or discussing the claim as a whole. As the result of such additional discussion, the carrier might well reiterate the position it took in the original notice of disallowance of part of the claim or might change its view as to the disallowance and thereafter accept the claim as a whole as originally filed. If payment occurred of either the portion allowed after acceptance by the shipper, or the claim as a whole within the two year and one day period, there would, of course, be no problem. However, under the cases cited herein, if payment were not made of the portion allowed within the

two year and one day period from the time the notice of disallowance of a portion of the claim was made, a suit could not thereafter be brought with respect to the portion of the claim allowed. This is precisely the holding in the *Rouw* case, *supra.*

The citation of the opinion of the Court of Appeal of California, filed August 21, 1973 though unpublished, is proper under Rule 977 of the California Rules of Court since this appeal is relevant under the doctrine of the law of the case.

Conclusion.

Wherefore, a Writ of Certiorari to the Court of Appeal of California, Second Appellate District, should issue so that the decision of said court in the instant cause may be reviewed by the Supreme Court of the United States.

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Attorney for Petitioner.

ALFRED D. FREIS,
Of Counsel.

APPENDIX "A."

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Xerox Corporation, Plaintiff and Appellant, vs. Transcon Lines, Defendant and Respondent. 2d Civil No. 40963, S.Ct. No. 5347.

Filed: Aug. 21, 1973.

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Berg, Judge Pro Tem. Reversed.

Latham & Watkins, Alan N. Halkett, James W. Daniels, for Plaintiff and Appellant.

Alfred D. Freis, for Defendant and Respondent.

Xerox sued Transcon, a common carrier, to recover damages alleged to have resulted from Transcon's mishandling in shipment of a large copying machine. Transcon obtained a summary judgment and Xerox appeals.

The trial court's granting of summary judgment was grounded on the failure of Xerox to file its action within two years following Transcon's written notice to Xerox disallowing the claim for damages.

Section 2(b) of the Uniform Domestic Bill of Lading which was adopted under the authority of 49 U.S.C., section 20(11)[1] and which covered the interstate ship-

[1]49 U.S.C. section 20(11) provides ". . . that it shall be unlawful for any such receiving or delivering common carrier to provide by rule contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice; . . . ."

ment of Xerox's copying machine provides in pertinent part:

"As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, or carrier in possession of the property when the loss, damage, injury or delay occurred, *within nine months after delivery of the property . . . and suits shall be instituted against any carrier only within two years and one day from the day when notice* in writing is given by the carrier to the claimant that *the carrier has disallowed the claim* or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid." (Emphasis added.)

The machine in question was shipped from New York to Texas in three crates. The damage was discovered upon opening of the crates at the final destination. Xerox filed its claim with Transcon on February 19, 1968 on a "Standard Form for Presentation of Loss and Damage Claims" and accompanied said form with a damage report. That report noted very minor damage to the crates but described major "concealed" damage to the contents.

On April 10, 1969, Transcon replied with yet another form which contained boxes to be checked. By appropriate checks the form stated "[XX] 4. Your claim declined for following reasons: [XX] (a) Shipment was delivered clear."

In an affidavit filed with the court in opposition to the motion for summary judgment, Blaine Ross,

Xerox' Eastern Area Traffic Manager, stated that "delivered clear" means that no visible damage was noted by the consignee on delivery of the shipment.

Xerox, on April 17, 1969, resubmitted its claim, pointed out that it was contending that the damage was "concealed." There followed a considerable exchange of corespondence and telephone contacts between agents for the parties. Transcon led Xerox to believe it was investigating further. In a letter dated July 29, 1969, Transcon stated that the claim had been sent to the delivering carrier "for additional investigation" and that "upon conclusion of their investigation, disposition of your claim will be made." Those negotiations culminated in a second disallowance by Transcon on October 1, 1969. The present action was filed June 16, 1971, 20 months after October 1, 1969, but 26 months after April 10, 1969.

The parties are in agreement and the law is clear that a carrier cannot by express waiver or other conduct estop itself from asserting the bar of a failure to present a claim within 9 months or a failure to file suit within the two year period, (*Thayer v. Pacific Elec. Ry. Co.*, 55 Cal.2d 430; *Burns v. Chicago, M., St. P. & P. R. Co.*, 192 F.2d 472; *Georgia, Fla. & Ala. Ry. v. Blish Co.*, 241 U.S. 191; *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209) which period begins to run from the time of an unequivocal denial of the claim by the carrier. (*Robinson v. Trustees of New York, N.H. & H.R. Co.*, 60 N.E.2d 593, at 598, (Mass. 1945), and *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed. 619.)

Thus we focus on Xerox' claim that the granting of a summary judgment was improper for the reason that

whether Transcon's notice of April 10, 1969 was an unequivocal and "final" disallowance of the claim presents a triable issue of *fact*. It contends that Transcon's disallowance based upon no visible damage was not responsive to its claim for "concealed damage" and that the subsequent conduct of the parties, while not creating an estoppel, is extrinsic evidence pointing to an interpretation that the notice was equivocal and thus ineffectual.

Where a statute prescribes a notice, which notice affects the rights of the parties, both the interpretation of the statute and a determination of the sufficiency of the notice are questions of law. (Evid. Code, § 310; Code Civ. Proc., § 1858.)

While a plain and unambiguous document does not call for judicial interpretation (*Skidmore v. County of Tuolumne*, 35 Cal.App.2d 525) its meaning is a question of law (*Holtman v. Butterfield*, 51 Cal.App. 89) as is the question of whether the document is or is not ambiguous. (*Barlow v. Frink*, 171 Cal. 165; *Silver v. Beverly Hills Nat. Bank*, 253 Cal.App.2d 1000.) Where a document is ambiguous and extrinsic evidence is offered to explain its meaning, which evidence is not in conflict, the interpretation of the document remains a question of law.

Whether or not the notice of April 10, 1969 constituted an unequivocal rejection of Xerox' claim is a question of law not fact. Our inquiry, however, does not end here. Since we are dealing with a question of law, we must make our own independent interpretation of the documents.

It is true as Transcon points out that neither the Federal statute nor the bill of lading requires that the

carrier give any reason for its rejection of a claim. If Transcon had on April 10, 1969 simply replied that the claim was declined there would be no question but what the limitation period would then have started to run. But Transcon did not do that. Instead it used a form which contained a number of alternative reasons for rejection of a claim.

In addition to the reason "Shipment was delivered clear," the form contains the following other reasons with boxes to be checked where applicable.

"(b) We hold clear delivery receipt and we have not received a request for concealed damage inspection.

"(c) Attached letter is self-explanatory.

"(d) Partial shortage was filled. Amend claim and return.

"(e) Your claim was not filed within the time limit specified under Section 2(b) of the Bill of Lading Contract."

Thus it is clear that the words "Your claim declined" do not always necessarily constitute a final rejection. The form also points up the significance in the industry, or at least the significance to Transcon, of the distinction between visual damage and concealed damage.

We conclude as a matter of law that the written notice of April 10, 1969 was not an unequivocal rejection but as in *Robinson, supra,* "left the door open" for further review of Xerox' claim for concealed damage.

The bill of lading is for the protection of the carrier and limits its exposure to liability and must be strictly interpreted against the carrier. Said another way, any

doubts as to the efficacy of the carrier's notice in setting in motion a period of limitation must be resolved in favor of the shipper.

Transcon's final and unequivocal rejection of Xerox' claim came on October 1, 1969. Since the action is not barred by the 2 year limitation period, the granting of the summary judgment was in error.

The judgment is reversed.

NOT FOR PUBLICATION

Compton, *J.*

We concur:

Roth, *P. J.*
Fleming, *J.*

September 13, 1973.

Court of Appeal, Second Appellate District, Division Two. 2nd Civil 40963.

Xerox Corporation vs. Transcon Lines.

THE COURT: PETITION FOR REHEARING DENIED.

/s/ Clay Robbins
Clerk

Dated: Dec. 6, 1973.

Order Denying Hearing After Judgment by the Court of Appeal.

In the Supreme Court of the State of California, in Bank.

Order Due October 19, 1973.

Xerox Corporation v. Transcon Lines. 2nd District, Division 2, Civil No. 40963.

Respondent's petition for hearing DENIED.

Filed: Oct. 18, 1973.

BURKE,
Acting *Chief Justice*

Dated Dec. 5, 1973.

In the Court of Appeal, Second Appellate District, State of California.

Xerox Corporation, a corporation, *Plaintiff and Appellant, vs.* Transcon Lines, a corporation, *Defendant and Respondent.* 2nd Civil No. 40963.

Appeal from Superior Court of Los Angeles County. Hon. Michael Berg, Judge *pro tem.*

Appellant's Opening Brief.

APPENDIX A.

49 U.S.C. § 20(11):

Provided further, that it shall be unlawful for any such receiving or delivering common carrier to provide by rule contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice; . . .

APPENDIX B.

Section 2(b) "Contract Terms and Conditions" of Uniform Domestic Bill of Lading;

2(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, or carrier in possession of the property when the loss, damage, injury or delay occurred, *within nine months after delivery of the property* (or, in the case of export traffic, within nine months after delivery at port of export) or, in the case of failure to make delivery, then within nine months after a reasonable time has elapsed; *and suits shall be instituted against any carrier only within two years and one day from the day when notice* in writing is given by the carrier to the claimant that *the carrier has disallowed the claim* or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid. (Emphasis added.)

California Rules of Court.

Rule 977: The following rule was released December 12, 1973, after the supplement to the 1974 edition was printed. (Please insert under the cover page of the pocket supplement).

Adopted by the Supreme Court of California and the Judicial Council of the State of California. Effective Jan. 1, 1974.

Rule 977. Citation of unpublished opinions prohibited; exceptions

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports* shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent. [*Adopted by the Supreme Court of California and by the California Judicial Council effective January 1, 1974.*]

DIVISION 3

Rules for Publication of Appellate Opinions Adopted by the Supreme Court of the State of California, effective January 1, 1964

Rule 976. [Publication of appellate opinions]

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports. [Adopted January 1, 1964.]

(b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule[1]

*This rule shall not apply to an opinion certified for publication prior to its actual publication.

[1]This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression,

(This footnote is continued on next page)

(2) involves a legal issue of continuing public interest,[2] or (3) criticizes existing law.[3] [As amended effective January 1, 1972; previously amended effective November 11, 1966.]

(c) [Courts of Appeal and Appellate Departments] Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it meets the standard for publication specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect. [As amended effective January 1, 1972; previously amended November 11, 1966.]

(d) [Superseded opinions] Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial

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where a legal rule or principle is applied to a substantially new factual situation.

[2]This criterion requires that the legal issue, rather than the case or controversy, be of public interest and that the interest be of a continuing nature and not merely transitory. Public interest must be distinguished from public curiosity. The requirement of public interest may be satisfied if the legal issue is of continuing interest to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group. An opinion which clarifies a controlling rule of law that is not well established or clearly stated in prior reported opinions, which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in the light of modern authorities elsewhere may be published under this criterion if it satisfies the requirement that the legal issue be of continuing public interest.

[3]This criterion would justify publication of the rare intermediate appellate opinion which finds fault with existing common law or statutory principles and doctrines and which recommends changes by a higher court or by the Legislature.

action shall be published in the Official Reports. [Renumbered effective January 1, 1972.]

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court, and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval. [Renumbered effective January 1, 1972; previously amended effective November 11, 1966.] *5 Cal. Jur. 3d Appellate Review § 559; Cal. Practice § 61:462; Witkin Procedure pp 396, 397, 468, 471, 499.*

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

* * *

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

No. 73-1102

In the
Supreme Court of the United States

October Term, 1973

TRANSCON LINES,

Petitioner,

vs.

XEROX CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

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October Term, 1973

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeal, Second Appellate District, State of California and the order of the Supreme Court of the State of California denying a hearing are set forth in Appendix "A" to the Petition.

JURISDICTION

Respondent and Petitioner agree that the subject matter of the within litigation is encompassed by the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (the "Act") and the statute of limitations applicable to the within action is the contractual two year and one day period provided in Section 2(b) of the Uniform Domestic Bill of Lading

(the "Uniform Bill") promulgated under Section 20(11) of the Act. The within action was authorized to be filed in state court by Section 20(11) of the Act. Section 20(11) of the Act and Section 2(b) of the Uniform Bill are set forth in the Appendix to the Petition.

After initial discovery by the parties, Petitioner moved for summary judgment pursuant to Section 437c of the California Code of Civil Procedure on the ground that the action was barred under Section 2(b) of the Uniform Bill because not brought within two years and one day after written notice from Petitioner to Respondent disallowing a freight damage claim submitted by Respondent. Disposition of Petitioner's initial motion for summary judgment and subsequent motion to reconsider and the appellate proceedings resulting therefrom are as set forth in the Petition.

Jurisdiction of this Court is asserted by Petitioner on the basis of 28 U.S.C. §1257(3), set out in full in the Appendix to the Petition. As set out more fully herein, this Court is without jurisdiction under such statute because (1) under Section 577 of the California Code of Civil Procedure there is no "final judgment or decree" for this Court to review, and (2) there is no substantial "federal question" presented meriting resolution by this Court.

QUESTION PRESENTED

Whether a particular form notice dated April 10, 1969 from Petitioner to Respondent constituted an unequivocal denial of Respondent's concealed damage claim sufficient to commence the running of the two year and one day statute of limitations in Section 20(11) of the Act and Section 2(b) of the Uniform Bill for the filing of the within action by Respondent.

STATUTES INVOLVED

28 U.S.C. §1257(3), 49 U.S.C. §20(11) and Section 2(b) of the Uniform Bill are set forth in the Appendix to the Petition. Sections 437c and 577 of the California Code of Civil Procedure are discussed herein.

STATEMENT

A. **Basis of the Action.**

Respondent is a New York corporation whose business includes the production of photocopying machines. Petitioner is a California corporation and a common carrier by motor vehicle as defined in 49 U.S.C. §303(14), and is engaged in the transportation of property in interstate commerce. On October 28, 1968, Respondent delivered to Petitioner at Respondent's plant in Blauvelt, New York three shipping crates for carriage to San Antonio, Texas. One of these crates contained a copying machine (the "Machine") which is the subject of the present action. At the time and place of delivery to Petitioner, the Machine was sound and in good working order.

On November 7, 1968, the Machine was delivered in San Antonio, Texas. Thereafter, it was discovered that the Machine was severely damaged and Respondent submitted its damage claim to Petitioner together with a copy of the damage report which described "major concealed damage" to the Machine. On about February 26, 1969, Petitioner issued written acknowledgment of the claim.

Thereafter, Respondent received a printed form letter from Petitioner dated April 10, 1969. On this form letter, by typewriter, Petitioner had marked two boxes, namely: one reading, "Your claim declined for following reasons," and another reading, "Shipment was delivered

clear." The term "delivered clear" in the parlance of the shipping industry means that no visible damage was noted by the consignee upon delivery of a shipment. Since Respondent's claim was for *concealed damage,* it was evident that Petitioner had either misinterpreted Respondent's claim or failed even to consider it, and on April 17, 1969 Respondent resubmitted the damage claim with a letter pointing out that the claim was for concealed, i.e. hidden, damage to the Machine.

Thereafter, there were a number of telephone conversations initiated by Respondent to a representative of Petitioner regarding the claim. In none of these conversations was there any indication by Petitioner that a final disposition of Respondent's claim has been made. On July 29, 1969, Petitioner sent a letter to Respondent stating that the claim had been sent to the delivering carrier "for additional investigation," and further stated that "*upon conclusion of their investigation, disposition of your claim will be made.*" (Emphasis added) There was no further contact between Respondent and Petitioner concerning the claim until October 1, 1969, and on about that date Respondent received a letter from Petitioner disallowing the concealed damage claim.

Until the filing of the present lawsuit in June 1971, there was no further contact between the parties relating to the claim. At no time prior to the initiation of this litigation did Petitioner indicate that it understood or considered its form letter of April 10, 1969 to be the final rejection of Respondent's claim.

B. **Prior Proceedings in the Action.**

On June 16, 1971, the within action was filed by Respondent in the Superior Court, Los Angeles, Cali-

fornia, to recover for the in transit damages to the Machine. After preliminary discovery, Respondent filed a motion for summary judgment asserting that the period of limitations commenced to run as of the date of Petitioner's form letter of April 10, 1969; that the period of limitations applicable to the claim was two years and one day; and that since the complaint had been filed more than two years and one day after April 10, 1969, the action should be dismissed. After first denying Petitioner's motion, on a motion for rehearing the trial court determined that the applicable period of limitations had run, and that Respondent's action was therefore barred, and awarded judgment dismissing the action. Respondent appealed.

The Court of Appeal, Second Appellate District, State of California, determined that the period of limitations did *not* commence to run on April 10, 1969, but rather on October 1, 1969, when Petitioner finally and unequivocally denied Respondent's claim and, thereafter, denied Petitioner's Petition for Rehearing. Subsequently Petitioner filed a Petition for Hearing in the California Supreme Court, and after denial of such petition filed its Petition with this Court.

ARGUMENT

The issue raised by Petitioner's motions for summary judgment is exceedingly narrow, namely whether a particular form letter, together with the markings in two "boxes" thereon, sent by Petitioner to Respondent with respect to a single damage claim was a sufficiently unequivocal disallowance of that claim to commence the running of a contractual statute of limitations which the parties agree is applicable to this action. Despite Peti-

tioner's labored attempts to enlarge this question to an issue of significance to the entire transportation industry, the issue remains one of interpretation of a single document in the context of transactions between Petitioner and Respondent regarding a single damage claim arising out of one freight shipment. No amount of semantics or histrionics by Petitioner can elevate this simple issue to a substantial question of federal law meriting this Court's review on certiorari.

As a result of its efforts to create for this Court a significant question of federal law, Petitioner has overlooked the absence of an elemental requirement for the exercise of this Court's jurisdiction under 49 U.S.C. § 1257(3), namely, the requirement that there be a "final judgment or order" for this Court to review. The within Petition is the third petition filed by Petitioner, each to review a decision of the Court of Appeal, Second Appellate District, State of California. That decision, however, is not, under federal or California law, a final judgment in the action, but rather simply overrules one of the defenses to the action raised by Petitioner and returns the action to the trial court for further proceedings, and the ultimate entry of a final judgment. Had the decision of the California Court of Appeal overruling Petitioner's motion been made by the trial court, it would have been neither a final judgment nor appealable under California law. The fact that such decision was rendered by an appellate court instead does not change such result.

Even apart from the absence of jurisdiction and the narrowness of the issue involved in the action, on these individual facts the decision of the California Court of Appeal was manifestly correct and should not now be

disturbed by this Court. Although Petitioner parades before this Court asserted dire consequences which will result from the decision in this action, it is obvious that such claims are at best irrelevant and at worst totally unfounded. In determining the simple, limited issue herein presented, the California Court of Appeal correctly determined that this particular carrier in this particular set of facts did not, in its form letter of April 10, 1969, provide the unequivocal claim disallowance required by the statute of limitations, and could not claim the benefit thereof in this single action. Presumably, Petitioner could avoid any future question of the kind involved in this action by simply changing its form letter.

I. THERE IS NO FINAL JUDGMENT AS REQUIRED BY 28 U.S.C. § 1257(3).

28 U.S.C. § 1257 provides, in part, that *"final judgments or decrees rendered by the highest court of a state in which a decision could be had"* may be reviewed by this Court in the manner set out in the three subparagraphs of the Section, including a petition for certiorari. But, as the Section clearly states, such review is limited to actions meeting the requirements set forth. Respondent does not challenge that the decision for which this Court's review is sought was rendered by the highest court from which a decision could be had. Respondent does challenge Petitioner's unstated premise that such decision is a "final judgment or decree." Federal and California decisions are in agreement that the decision is not a final judgment in this action. A brief analysis of the proceedings in the action demonstrates this.

The proceeding giving rise to the appellate review resulting in the Petition was not a trial of or decision upon the merits of the action. The Petition herein evolves from Petitioner's motion for a summary judgment in the action brought under Section 437c of the California Code of Civil Procedure, and a renewal of that motion after its initial denial. After the second hearing on the motion, the trial court granted the motion and entered a judgment dismissing the action and Respondent appealed. Upon appeal the order granting the judgment was reversed by the California Court of Appeal, and as a result, the judgment ordered to be vacated. The California Supreme Court denied a hearing. The effective and logical result of this sequence, then, is identical to a denial of Petitioner's motion for summary judgment in the first instance; i.e. the motion for judgment is denied and the action proceeds in normal course. The decision, then, determines nothing more than that the action be remanded for further proceedings in the trial court. As this Court has previously held on numerous occasions, when a state court judgment is reversed by an appellate court and an action remanded for further proceedings, the appellate court decision is not a final judgment or order and cannot be reviewed by this Court, whether or not a federal question is involved. *McComb v. Commissioners of Knox County, Ohio,* 91 U.S. 1 (1875); *Great Western Telegraph Co. v. Burnham,* 162 U.S. 339 (1896); *Haseltine v. Central National Bank,* 183 U.S. 130 (1901). Since no dismissal of the action was ordered, and no attempt made to determine the ultimate rights of the parties to the litigation, finality is clearly lacking. *McComb v. Commissioners of Knox County, Ohio, supra; Meagher v. Minnesota Thresher Mfg. Co.,* 145 U.S. 608 (1892); *Clark v. City of Kansas City, Kansas,* 172 U.S.

334 (1899); *Missouri & Kansas I. R. Co. v. Olathe*, 222 U.S. 185 (1911); *Jung v. K & D Mining Co.*, 356 U.S. 335 (1958). As this Court stated in discussing the finality of a decision necessary for this Court's review in *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548 (1945):

> Final it must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court. (at 551)

As set forth above, the decision of which Petitioner complains is not a final determination in accordance with the definition set out in this Court's decisions.

Further, California law is in accord with the federal cases. Section 577 of the California Code of Civil Procedure states that "A judgment is the final determination of the rights of the parties in an action or proceeding." Because a judgment is the final determination, there can be only one final judgment in an action. *Bakewell v. Bakewell*, 21 Cal.2d 224 (1942); *Bank of America Nat'l Trust & Savings Assoc. v. Superior Court*, 20 Cal.2d 697 (1942); *Nicholson v. Henderson*, 25 Cal.2d 375 (1945); *Shapiro v. Equitable Life Assur. Soc. of U.S.*, 76 Cal.App.2d 75 (1946). Because a judgment is the final determination in an action, an order denying a motion for summary judgment in an action cannot be a judgment, final or otherwise, and cannot constitute an appealable judgment. *Nevada Constructors, Inc. v. Mariposa Public Utility Dist.*, 114 Cal.App.2d 816 (1953). Rather, an appeal may be had by a party unsuccessful on such a motion only from a judgment entered after a trial following denial of

the motion. *Bank of America Nat'l Trust & Savings Assoc. v. Superior Court of San Diego County,* 4 Cal. App.2d 435 (1970). An order denying a motion for summary judgment does not determine any issue, its effect being merely a finding that there is an issue of fact to be tried. *Schulze v. Schulze,* 121 Cal.App.2d 75 (1953).

In summary, the Petition filed here is prematurely filed because the entry of a final judgment necessary for this Court's jurisdiction has not yet occurred. Rather, Petitioner asks for review of an interlocutory order in the action, a review for which there is no basis under 28 U.S.C. §1257(3).

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW PRESENTED.

At no time has there been any dispute between the parties to this litigation concerning which statute of limitations applies to the facts here involved: both agree that the applicable period is two years and one day, as provided in Section 2(b) of the Uniform Bill, derived from Section 20(11) of the Act. There has likewise been no dispute between the parties as to the nature of the event which triggers the running of the period of limitations, namely, the giving of written notice by the carrier to the claimant. Finally, there is no dispute over the fact that the carrier, Petitioner, did give such written notice so as to commence the running of the period of limitations.

The issue which was in dispute, and which was presented to the trial court and to the California Court of Appeal is: *When* did Petitioner give to Respondent such notice as to commence the running of the applicable period of limitations against Respondent's claim for con-

cealed damage? This issue can perhaps also be stated as: Did Petitioner's form letter of April 10, 1969 constitute such notice as to commence the running of the period of limitations against Respondent's claim for concealed damage to the Machine? Petitioner insists, however, that implicit in the decision of this question is a rejection of an entire framework of law involving the Act and numerous federal decisions and that the decision requires this Court to state in a written opinion the requirements of a written notice disallowing a freight claim (Petition, P. 7). Respondent submits that the decision of the California Court of Appeal neither runs contrary to such established law nor presents to this Court a substantial question of federal law meriting this Court's review.

As indicated above, no dispute exists among the parties as to the applicable statute of limitations, the period provided for therein and the event necessary to trigger the statute. Section 2(b) of the Uniform Bill, Section 20(11) of the Act and the numerous cases referred to by Petitioner clearly provide that (a) when a carrier give written notice unequivocally denying a shipper's freight damage claim (b) a period of two years and one day automatically commences to run in which a shipper must file an action to recover on such claim or be barried and (c) such period for filing an action cannot be subsequently tolled by the actions of either party. Although Petitioner embellishes these premises with lengthy historical commentary and explanations of their mechanical application (Petition, PP. 8-10), it is unclear what, if any, relevance such discussion has to the issue in dispute. There is nothing in the opinion of the California Court of Appeal to indicate that it took issue with any of the clearly established and unquestioned premises set out above. Rather, the California Court of Appeal quite explicitly

recognized the applicability of these premises to the within action (Petition, Appendix PP. 1-2).

Against this legal framework, the California Court of Appeal simply examined a particular notice asserted by one carrier to be the unequivocal written notice of disallowance required by the relevant law to start the period provided by the statute of limitations. Upon review of the form notice as filled out and forwarded to Respondent, the California Court of Appeal determined that in this case, this particular notice did not constitute the unequivocal notice required, and therefore the statute of limitations had not commenced to run from the date on which it was sent. In short, the California Court of Appeal reviewed one isolated transaction to determine when the statutory notice had been provided. This decision does not, as Petitioner asserts, run contrary to the weight of authority (Petition, P. 8) and does not, as Petitioner implies, create a precedent requiring such notices to decline a claim without explanation (Petition, P. 10). The only issue which the decision determines is that the particular notice at issue in this case was not an unequivocal written notice of disallowance as required.

The resolution of this issue, an issue necessarily limited in application to these parties and this transaction, neither requires nor merits the review of this Court and does not require the establishment by this Court of any general set of requirements for a notice in writing disallowing a freight claim under the Act. Accordingly, this issue, the only one presented in the within action, does not present a substantial question of federal law justifying exercise of the Court's power of review under 28 U.S.C. §1257(3).

III. THE DECISION BELOW IS CLEARLY CORRECT.

Petitioner sets out at length asserted dire consequences to the carrier industry flowing from the allegedly incorrect decision of the California Court of Appeal (Petition, PP. 11-15). Petitioner sets out three purported consequences which require review of the decision. Although Respondent does not wish to unduly lengthen this brief by exhaustive response to such contentions, Respondent believes that a short discussion of the points raised by Petitioner will show that such contentions are without merit.

First, Petitioner asserts that the tendency of the decision is to restrict the wording of notices of disallowance, a tendency which Petitioner asserts will force carriers to eliminate useful discourse with shippers regarding damage claims or will lead to voluminous record storage problems for carriers (Petition, PP. 11-13). To so interpret the decision loses sight of its quite narrow scope. As discussed *infra*, all that the decision determines is when an unequivocal notice of disallowance was given in this particular case and with respect to a particular claim. In so doing, it simply affirms the long standing law, that an unequivocal notice of disallowance of a freight damage claim is necessary to commence the period for filing an action. The decision neither purports to nor actually affects other communications between shippers and carriers with respect to damage claims. The one point, the only point, decided by the Court is that there must be an unequivocal written disallowance. Contrary to Petitioner's assertions, nothing is stated nor implied which would prohibit explanation or discussion of the reasons for disallowance, either before or after the unequivocal written notice of disallowance. Carriers and shippers remain free to engage in such dialogue subject to normal limita-

tions of expense and the size of the claim involved. That such dialogue may require record keeping regarding such claims is not a new development occasioned by the decision and certainly is irrelevant to the decision of the California Court of Appeal. Carriers remain free to correspond as much or as little regarding freight damage claims as they choose, since the "tendency" asserted by Petitioner does not, upon examination, exist.

Second, Petitioner asserts alleged unequal treatment of carriers from the requirement of unequivocal written disallowances of freight damage claims while allowing shippers latitude in form of claims (Petition, PP. 13-14). For two reasons, the argument is unconvincing. First, the argument is irrevelant to the decision in the action. The decision does not attempt to set a standard for written notices of disallowance. The standard is in the statute itself, and the decision merely interprets a document in the light of that statutory standard. Petitioner's argument is misdirected. Second, Petitioner's argument loses sight of the basis thrust of the provisions of Section 2(b) of the Uniform Bill and Section 20(11) of the Act relating to written notices of disallowance. Quite clearly these provisions are for the benefit of the carrier in cutting off the right of a shipper to file an action. Provisions of this type have quite properly been strictly construed against the party seeking to take advantage of them, and where an act (such as a written notice) is required to trigger them, such act has been closely scrutinized. In short, Petitioner's argument that the statute and contract allowing it to come within the purview of a statute of limitations beneficial to it alone be construed broadly in its favor is not well taken.

Third, Petitioner asserts that the concept of a final (i.e., unequivocal) disallowance has no place in the field

of freight damage claim treatment (Petition, PP. 14-15). In addition to the obvious fact that the statute is to the contrary and requires such a disallowance to commence the running of the period for a shipper's filing of an action, Petitioner's argument is unsound for another reason. As Petitioner itself notes, discussion of claims may occur over a lengthly period before *and after* the disallowance of all or a part of a damage claim (Petition, P. 14). Yet, a shipper has, under the statute, a very precise time period if his claim is finally disallowed in which to file an action. That he know when this period commences (and terminates) is critical to exercise of his rights, whatever continued discussion may ensue after rejection of his damage claim. Common sense, as well as long standing legal principles, dictate that a shipper be entitled to an unequivocal notice of disallowance under such circumstances and any ambiguity arising with respect to a purported disallowance be resolved against the carrier. As provided in Section 1654 of the California Civil Code:

> In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the ambiguity to exist.

The obvious prejudice occasioned by elimination of the requirement that a purported disallowance be unequivocal and that ambiguities in purported disallowances be construed against carriers is a complete answer to Petitioner's argument.

CONCLUSION

For the reasons set forth, this Court should deny the issuance of a writ and dismiss the Petition filed herein.

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